86-60

Supreme Court, U.S.
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CLERK

No.

SUPREME COURT OF THE UNITED STATES

Term

RONALD POOLER
and
RONNIE BRADLEY,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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84-70

QUESTIONS PRESENTED

General Background:

The Appellants were arrested on or about March 18, 1982, pursuant to warrants issued by a Pennsylvania judicial officer on charges that they possessed and sold a controlled substance on the premises of the Veterans Administration Hospital, in Coatesville, Pennsylvania. Said charges directly stemmed from the filing of an affidavit by one Curtis Kimmel, a police officer employed by the Veterans Administration. All charges were subsequently nolle-prossed in August of 1982.

I.

Whether the actions of a Veteran's Administration police officer, through the filing of a criminal affidavit that was intentionally and/or recklessly misleading, containing misrepresentations and misstatements as to the credibility and nature of an undercover drug investigation that consisted of the unverified and non-corroberated efforts of a solitary individual, who was known to be brain damaged, who happened to be a prime "suspect" in a previous drug investigation in which this Veteran's Administration police officer had taken part, and who had been hospitalized for and was continuing treatment for depression, falls within the ambit of the Intentional Tort Proviso contained in 28 U.S.C. Section 2680(h)?

II.

If the actions of the Veterans Administration officer do fall within the ambit of 28 U.S.C. Section 2680(h), whether the preexisting "discretionary function" exception set forth under 28 U.S.C. Section 2680(a) can be deemed applicable to civil matters brought pursuant to the 1974 Amendment to the "investigative or law enforcement" exception set forth in section 2680(h)?

III.

If the "discretionary function" exception is indeed found to be a restriction upon the rights Congress specifically attempted to grant by means of the 1974 Amendment to 28 U.S.C. Section 2680(h), whether the circumstances of the instant case are to be placed into the "rare" number of situations wherein a suit permissible under subsection (h) would be barred by the operation of subsection (a)?

BEST

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Rule 20.4, United States Supreme Court Rules 1

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: Ronald Pooler and Ronnie Bradley, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled civil action on March 27, 1986.

OPINIONS BELOW

The opinion of the Majority of the Third Circuit Court of Appeals is unreported and is printed in Appendix A hereto, infra, page A-1. The concurring Opinion of Judge Collin Seitz is printed in Appendix A hereto, infra, page A-11. The Judgment of the Circuit Court is printed in Appendix A hereto, infra, page A-17.

The opinion of the United States District Court for the Eastern District of Pennsylvania per J. William Ditter, Jr., J. is printed in Appendix A hereto, infra, page A-32. The opinion of Alfred L. Luongo, C.J. of this same court is printed in Appendix A hereto, infra, page A-19.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 27, 1986. A timely petition for rehearing was denied on April 22, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1) in that this is a petition of a final judgment by the aforereferenced Circuit Court.

The petition is timely under Rule 20.4., United States Supreme Rules, for it is being filed within the ninety (90) day period accruing subsequent to the denial for rehearing. *See* 28 U.S.C. Section 2101(c).

QUESTIONS PRESENTED

General Background:

The Appellants were arrested on or about March 18, 1982, pursuant to warrants issued by a Pennsylvania judicial officer on charges that they possessed and sold a controlled substance on

the premises of the Veterans Administration Hospital, in Coatesville, Pennsylvania. Said charges directly stemmed from the filing of an affidavit by one Curtis Kimmel, a police officer employed by the Veterans Administration. All charges were subsequently nolle-prossed in August of 1982.

I.

Whether the actions of a Veteran's Administration police officer, through the filing of a criminal affidavit that was intentionally and/or recklessly misleading, containing misrepresentations and misstatements as to the credibility and nature of an undercover drug investigation that consisted of the unverified and non-corroberated efforts of a solitary individual, who was known to be brain damaged, who happened to be a prime "suspect" in a previous drug investigation in which this Veteran's Administration police officer had taken part, and who had been hospitalized for and was continuing treatment for depression, falls within the ambit of the Intentional Tort Proviso contained in 28 U.S.C. Section 2680(h)?

II.

If the actions of the Veterans Administration officer do fall within the ambit of 28 U.S.C. Section 2680(h), whether the pre-existing "discretionary function" exception set forth under 28 U.S.C. Section 2680(a) can be deemed applicable to civil matters brought pursuant to the 1974 Amendment to the "investigative or law enforcement" exception set forth in section 2680(h)?

III.

If the "discretionary function" exception is indeed found to be a restriction upon the rights Congress specifically attempted to grant by means of the 1974 Amendment to 28 U.S.C. Section 2680(h), whether the circumstances of the instant case are to be placed into the "rare" number of situations wherein a suit permissible under subsection (h) would be barred by the operation of subsection (a)?

STATUTE INVOLVED

There are actually two provisions of the Federal Tort Claims Act involved in the matter under review. The first is the general grant of jurisdiction, 28 U.S.C. Section 1346(b). It holds as follows:

> Subject to the provisions of chapter 171 of this title [28 U.S.C. Section 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Modifying the broad parameters of the above provision is 28 U.S.C. Section 2680. This section provides, in pertinent part as follows:

> The provisions of this chapter and section 1346(b) of this title [28 U.S.C. Section 1346(b)] shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulations, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process,

libel, slander, misrepresentation, deceit, or interference with contract rights:

Provided, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 U.S.C. Section 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law.*

STATEMENT OF THE CASE

The consolidated matters pending review before this Court by means of the instant Petition for the Grant of a Writ of Certiorari were brought pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and 2671 et seq. Timely administrative claims were filed by the Appellants with the Veteran's Administration and the aforementioned claims for, *inter alia*, false imprisonment, assault, battery, malicious prosecution, abuse of process, loss of reputation and negligence, were subsequently denied. This denial brought about the separate Federal Tort Claim filings of the Appellants before the United States District Court in and for the Eastern District of Pennsylvania. The District Court filings were likewise timely.

The determination of the questions presented in this matter have direct effect on two companion matters before the United States District Court for the Eastern District of Pennsylvania, namely *Dale Wells v. The United States of America*, Dkt. No. 85-0037 and *Mark Bailey v. The United States of America*, Dkt.

*The Act of March 16, 1974 substituted subsection (h) for former subsection that read:

"Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

No. 85-0036. Both actions stem from the same course of events that resulted in the arrests of Appellants, Pooler and Bradley. Additionally, the matter being presented on behalf of Mark Bailey has a companion *Biven's* action, wherein a Veteran's Administration police officer, Curtis Kimmel along with John Cantrell, the undercover informant and James Parsons are named as individual defendants, Dkt. No. 84-4019.

THE EVIDENCE

On or about March 18, 1982, the Appellants were arrested and charged with the possession and sale of a controlled substance which in Pooler's case was cocaine and in Bradley's case was marijuana. All charges against the Appellants were nolleprossed by the Chester County District Attorney's office on or about August 24, 1982.

One must now digress to November, 1980 to understand the events that presaged the aforementioned arrest of March, 1982. On November 6, 1980, The Chief of the Pharmaceutical Department at the Veteran's Administration facility located in Coatesville, Pennsylvania discovered a considerable discrepancy between the amount of "Darvon 100" tablets issued to a particular ward and those actually being consumed by the patients of that same ward. Fourteen days later, the director of the Coatesville Facility authorized an investigation in an attempt to garner information concerning the aforementioned discrepancy. An investigating board was gathered with the sole Veteran's Administration law enforcement representative member being one Curtis Kimmel.

The aforementioned panel learned that one John Cantrell, who is employed by the Veteran's Administration in the Building Management Service Department, had been described as being involved in drug trafficking by unnamed informants. Interviews with Cantrell by the panel were deemed to be inconclusive and Cantrell eventually refused to give any further information to the panel and this refusal was supported by his attorney.

During March of 1981, the director of the Veteran's Administration Medical Center in Coatesville, Pennsylvania contacted the Veteran's Administration Central Office because of the concern over use and distribution of controlled substances. Later in the same year, specifically November, one of the Appellants, Ronald Pooler was hired by the Coatesville Facility. As a result of the concern shown by the Director of the Veteran's Administration Medical Center, Veteran's Administration police officer, Curtis Kimmel, who had purportedly received some training in conducting undercover investigations, approached the "suspect" in the Darvon disappearance matter and asked this "suspect", Mr. John Cantrell, to participate in an undercover drug operation. (Deposition of Curtis F. Kimmel at page 30, lines 6 through 8, inclusive). This request of aid from the officer happened to arise during another investigation into a complaint that was received from a patient that certain effects that had been entrusted to Mr. Cantrell had become missing. (Deposition of John Cantrell at page 6, lines 7 through 24, inclusive and at page 7, lines 4, 5 and 6, and at page 8, lines 21, 22, and 23).

The Court should be aware of the fact that at all times that Officer Kimmel was dealing with informant Cantrell, there was knowledge by the Officer that the informant was brain damaged, with limited reading and writing ability. (Deposition of John Cantrell, at page 60, lines 3 through 21, inclusive). Additionally, the Veteran's Administration police officer was aware of the fact that his prospective informer had been in the hospital for stress or depression and was receiving treatment for same. (Deposition of Curtis Kimmel page 34, lines 11 through 15, inclusive and at page 54, lines 2 through 16, inclusive).

Prior to the start of the undercover "operation", the Veteran's Administration police officer was advised by his informant of his "past" utilization of controlled substances. (Deposition of John Cantrell at page 53, lines 1 through 4, inclusive). As a result of the above knowledge by Officer Kimmel, there can be no contention that this investigative officer was not fully aware of the limitations of his informant prior to the start of this investigation.

The Circuit Court was correct in noting that Appellants, Pooler and Bradley, do not contend that the Federal officials in charge of the Veteran's Administration Hospital lacked discretion to conduct investigations of drug distribution on the hospital grounds. (Appendix A at A-6). Although it is admitted that Officer Kimmel did engage the services of Mr. Cantrell as his informant, it should be noted that there were no other plans or policies set forth by the officer to cover this undercover investigation. The mentally deficient informant was not given any instructions on how to pick a suspect nor was he given any information or instructions as to the procedures to follow in trying to purchase controlled substances. (Deposition of John Cantrell, at page 19, lines 6 through 11, inclusive).

The judgment that Officer Kimmel purportedly utilized in this matter can be seen through his own testimony:

> Basically Mr. Cantrell was told to talk with the different people suspected of selling drugs. The majority of the people, I didn't even know who they were. There were people who John had just contacted himself that he knew through previous employment at the Veteran's Administration, or through his employment at the Veteran's Administration had known or suspected they used or sold drugs. He was just told to talk to them, to try to arrange a buy. As soon as they made that arrangement, he contacted me. I provided him with the money. (Deposition of Curtis Kimmel at page 47, lines 12 through 21, inclusive).

The methodology utilized by the informant consisted of walking up to individuals and asking them if they had any drugs to sell. (Deposition of John Cantrell page 25, lines 1 through 4).

Although Officer Kimmel sought the guidance of the chief of the Coatesville Police Department, one Gary T. Swiger, concerning the handling of undercover operation and was advised by Chief Swiger of the need to maintain surveillance of the cooperating individual as well as the taking of photographs and the utilization of electronic surveillance equipment, said recommendations were not followed by Officer Kimmel concerning any purported deals made with the Appellants. (Deposition of Gary

T. Swiger at page 10, lines 13 through 23, inclusive; Deposition of Curtis Kimmel at page 47, lines 22, 23, 24 and at pages 48 through 50).

The shortcomings inherent in an investigation stemming from lack of surveillance have been stressed not only by plaintiff 's expert witness but indeed by defendant's own expert witness. Plaintiff 's expert, Charles V. Wunder, in response to the deposition inquiry of Appellee's legal counsel regarding his conclusion that ". . . there was no proper observation or surveillance of the informant", noted the following:

> By reading the reports, I found that there was no consecutive surveillance. In all the documents that I have read, that in some areas there was a limited pat-down and the individual was left on his own to go out and do whatever he had to do, and then report back to Detective Kimmel. In most cases, this is what was done.
>
> The reason I came up with the statement I did is because the only person that establish most of these cases were the informant, Cantrell, and from what I said about Cantrell, his hospitalization, his treatment, his possible brain damage, these items, along with the use, admittable use from testimony or other people about using marijuana and drinking, and the testimony given to establish the warrant in which the arrests were made were saying that Cantrell was a reliable informant in the past, or by most of the reliability hinged on the present and existing case that they were working on, that only the documented reliability was a very minor theft or fraud of a coke machine or something like that. With this type of an investigation having to do with a drug such as cocaine that in my opinion, that key informant was not properly followed, properly indoctrinated to what to do, screened, the whole basis of this fiber of being informant did not sit to criteria that, in my experience, that I was trained to teach and trained to do. (Deposition of Charles V. Wunder, at page 40, line 24 and at page 41 and at page 42, lines 1 through 4, inclusive).

The defendants' expert, George Miller, as identified in the consolidated companion actions of *Mark Bailey v. United States of America*, and *Mark Bailey v. Curtis Kimmel, et al.*, has testified that the scenario ran by Officer Kimmel would not fall within his definition of a controlled buy. (Deposition of George Miller, at page 29, lines 21, 22, 23, 24 and at page 30, line 1).

With intentional disregard of the absolute need for verification of the informant's "story", and with the informant being Veteran Administration Officer Kimmel's sole means of information regarding the fact that a Ronnie Bradley or a Ronald Pooler existed on the face of this globe, much less being involved in purported possession or sales of a controlled substance, the aforementioned officer filed a criminal affidavit that was intentionally and/or recklessly misleading, and which contained misrepresentations and misstatements as to the nature of the investigation.

This affidavit identified the informant as being "reliable". This informant was so reliable that when he was presented to Chester County detectives for evaluation, it was decided that the county would not enter into a joint investigation seeking convictions utilizing the services of said informant. No referral to this negative reaction by the Chester County detectives to Mr. Cantrell's inherent unreliability was contained in the above-referenced affidavit which led to the Appellant's arrest.

Nor will the Court find any notation in the affidavit of the fact that the informant was the primary suspect in a previous Veteran's Administration drug investigation and that he had admitted to being a drug user. Equally conspicuous through its absence was a notation that the informant was brain damaged, with limited reading and writing ability.

The affidavit intentionally and affirmatively mislead the reviewing magisterial official by its notation that the informant had made numerous "controlled buys" from other drug dealers while under police officer Kimmel's supervision. First, these other buys happened to stem from the identical investigation which led to the arrest of the Appellants as well as nine other individuals. Thus the affidavit attempts to boot strap some sort of

credibility by pointing to the contemporaneous ancillary investigations as providing some sort of track record for the informant. Additionally, the notation of "controlled buys" is now falsehood as has been set forth previously. There were no controls whatsoever exercised upon the activities of the informant. No surveillance, no wire, no photographs, and no marked currency.

It is the Appellant's contention that without the intentional misrepresentation of the nature of the reliability of the informant and the nature of the investigative procedure utilized, that a finding by a neutral magistrate would have been equivalent to that made by the United States of America merit systems protection board on September the 17, 1982 which held:

> After a careful review of all the testimony in this case, all the documents submitted by both parties, including portions of the two preliminary transcripts, and my observations concerning Mr. Cantrell's demeanor, I find that, absent independent corroberating evidence, Mr. Cantrell's testimony is *not* worthy of belief. He frequently could not recall his prior testimony (see, i.e., H.T. PP. 34, 36, 37, 43, etc.), contradicted himself concerning locations and times, admitted to being hospitalized for mental health problems and drug abuse (H.T. P.43), and would simply not be believable. Further, Mr. Cantrell himself concedes that he has a problem with his memory that "sometimes" he can't remember "exactly down to the event" (H.T.P. 198). (Merit Systems Protection Board Opinions at 6).
>
> Officer Kimmel's intentional camouflage of the nature of the informant and the nature of the operation prevented the neutral magistrate from tendering any valid judicial review and it is this issue that forms the factual crux of the Appellant's case.

THE RULINGS BELOW

The District Court, after recognizing that other courts would not necessarily agree with the analysis utilized, dismissed

the complaints at the pleadings stage on the ground that the actions complained of fell within the discretionary function exception to the Federal Tort Claims Act. In so doing, the Lower Court followed the determination in the matter of *Gray v. Bell*, 712, F2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) holding that before a suit may be maintained against the United States, even for an intentional tort falling within the proviso of 28 U.S.C. Section 2680(h) the plaintiff must first clear the hurdle of the discretionary function exception.

The Court of Appeals did not follow the lower court determination of this matter. Indeed, the lower court specifically found that the actions of Veteran's Administration police officer, Curtis Kimmel did not fall within the intentional tort proviso of the 1974 amendment Section 2680(h). Circuit Judge Seitz, in his concurring opinion specifically disagreed with the above determination of the court of appeal. Judge Seitz determined that the factual situation did indeed present a matter within the intentional tort proviso of the amendment to section 2680(h) but then held as the Lower Courts did, that the matter of *Gray v. Bell. supra*, would be controlling.

REASONS FOR GRANTING THE WRIT

1. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS.

The primary issue in this Civil Action concerns the scope of 28 U.S.C. §2680 (h) and whether or not the actions complained of herein, fall within the parameters of the scope of the aforementioned sub-section. A conflict is set forth within the Circuit Court of Appeals for the Third Circuit concerning this very issue. The majority opinion has limited the scope of the aforementioned sub-section to types of behavior that provided for the initial motivation for the Amendment's in 1974. The concurring opinion from the former Chief Judge of the Third Circuit Court of Appeals, Collin J. Seitz, takes issue with the majority's "limitation".

Judge Seitz, in the aforementioned concurrence noted that: There are few cases interpreting the scope of Section 2680 (h) and even fewer addressing the interrelationship between that section and the discretionary function exception. The intentional tort proviso was enacted by Congress in 1974. Several incidents in which federal agents engaged in "abusive, illegal, and unconstitutional 'no-knock' raids" Sen. Rep. 93-588 reprinted in 1974 U.S. Code Cong. & Admin. News 2789, 2790, motivated Congress to amend the FTCA to prevent "future abuses." *Id.* The amendment was generally intended to be co-extensive with actions brought under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), to provide a cause of action against the government whenever *Bivens* would provide one against the individual federal employee. Sen. R.P. 93-588, reprinted in 1974 U.S. Code Cong & Admin. News at 2791. *See also*, *Carlson v. Green*, 446 U.S. 14, 19-20 (1979).

However, the proviso was not, as the majority holds, intended to be limited in scope to the types of behavior that provided the initial motivation for his passage:

This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizure that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendments should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal Law. Sen. Rep. 93-588, reprinted in 1974 U.S. Code Cong. & Admin. News at 2791.

Because Congress intended Section 2680 (h) to encompass activities outside the arrest, search and seizure context, See e.g., *Carlson v. Green, supra*. (§2680 (h) allows action

for death of prisoner due to intentional indifference of federal prison officials motivated by racial prejudice), this case forces us to confront the interface between Sections 2680 (a) and 2680 (h). *Pooler v. United States,* No.: 85-1490 (3d Cir. Mar. 27, 1986), *Bradley v. United States of America,* No.: 85-1490 (3d Cir. Mar. 27, 1986) (concurring opinion at 13, 14, 15).

Judge Seitz does not stand alone with regard to this position for the court in *Sami v. United States,* 617 F.2d 755, 764 (D.C. Cir. 1979), likewise resorted to a review of the senate report on the 1974 amendment in discerning the amendments broad purpose. See also, *Art Metal — U.S.A., Inc. v. United States,* 577 F. Supp. 182, 185 (D.D.C. 1983).

Thus, not only is there a divergence of Opinion within the Third Circuit Court of Appeals as to the extent of the aforementioned Subsection of the Federal Tort Claims Act, but the majority Opinion is at odds with that set forth by the District of Columbia Circuit Court and District of Columbia District Court.

If indeed the actions complained of in the instant matter do fall within Section 2680 (h), the remaining questions may not yet be ripe for disposition due to the fact that the lower court has not fully taken the opportunity to review the question concerning the interplay between the discretionary function exception and the subsequently enacted "exception to the exception" contained in Section 2680(h). *Pooler v. United States of America, supra.* at 10; *Bradley v. United States of America, supra.* at 10.

If the Court, in its wisdom, decides that the issue of the interrelationship between Sections 2680(a) and 2680(h) is indeed before it, it is respectfully submitted that the analysis followed by Judge Seitz as set forth in the matter of *Gray v. Bell,* 712 F.2d 490 (D.C. cir. 1983), *cert. denied,* 465 U.S. 1100 (1984) actually eviscerates the intent behind the 1974 amendment. The Second Circuit Court of Appeals, in *Caban v. United States v. United States,* 671 F.2d 1230, 1234 (1982) showed specific concern that the two provisions at issue should not be read to eviscerate each other. The Court in *Sami v. United States, supra.* at 764, noted that there was uncertainty as to whether by the enactment of

Section 2680 (h), which is deemed to be a proverbial exception within an exception, the Congress of the United States meant to preserve the discretionary exception at all for those enumerated torts contained within the 1974 amendment. The Court noted that "[n]either the amendment nor the Senate's report is explicit as to the applicability of Section 2680 (a) to Section 2680 (h). The amendment, speaking as it does of assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution, surely envisioned at a minimum an intrepretation of Section 2680 (a) that would not immunize the wrongful or negligent carrying out of initial decisions to search, arrest, detain, prosecute or utilize legal process." Id. at 768.

Keeping in mind that the Amendment was generally intended to be co-extensive with actions brought under *Bivens v. Six Unknown Federal Narcotic Agents, Supra,* and thus to provide a cause of action against the government whenever *Bivens* would provide one against the individual federal employees, it is urged that the holding in the matter of *Townsend v. Carmel,* 494 F. Supp. 30, 36, 37 (D.D.C. 1980) be embraced by this Court in that the parameters of Section 2680 (a) are not to be applied to law enforcement officials. It is recognized that the determination in *Townsend v. Carmel, Supra.* was rejected by the D.C. Circuit Court in the matter of *Gray v. Bell,* 712 F. 2d 490 (1983), *Cert. Denied,* 465 U.S. 1110.

The Court in *Gray* recognized that the intentional torts listed under the proviso to Section 2680 (h) may be committed without any exercise of a discretionary function. To that end, the provisions of Section 2680 (a) and 2680 (h) are neither inconsistent nor mutually exclusive. The Court further noted that "[i]t is true that in some instances — as with the claim of malicious prosecution — the challenged conduct may involve discretionary functions and, thus, be covered by the Section 2680 (a) exception." *Id.* at 507, 508. The *Gray* determination predated this court's decision in the *United States v. S.A. Empresa de Viacaco Aerea Rio Grandense (Varig Airlines),* 104 S. Ct. 2755 (1984). With the *Varig Airlines* determination directing the courts to analyze the "nature and quality of the activity", it is respectfully submitted that the application of this test would

mandate the inclusion of virtually every malicious prosecution situation within the ambit of the discretionary function exclusion. It would seem every prosecutorial situation by a law enforcement officer would include the process of accessing the results of an investigation in deciding whether or not those results warrant presentation to the prosecuting authority of an affidavit. Thus, the application of the *Varig Airlines* analysis would lead to the evisceration by the discretionary function exception of the 1974 amendment and thus, effectively undercut the Congressional intent of the aforementioned amendment.

Furthermore, the Gray determination, as was noted by Judge Seitz in his concurring opinion at 15, was supported by the proclamation that "Statutes which wave [the] immunity of the United States from suit are to be construed strictly in favor of the sovereign", Citing *McMahon v. United States*, 342 U.S. 25, 27 (1951). It is submitted that this latter proclamation, which appears to be the lynchpin supporting the *Gray* Decision, is clearly improvident. This impropriety is manifest through a review of the decision of this court in *Kosak v. United States*, __U.S. __ , 104 S.Ct. 1519 (1984). This Court, in an interpretation of 28 U.S.C. Section 2680 (c), found that the identical approach utilized by the Court in *Gray, supra.*, namely, that Statutes waiving the sovereign immunity of the United States must be construed strictly in favor of the sovereign, as being inappropriate. ("We find such an approach unhelpful"). The Court found that:

> "Though the Court of Appeals is certainly correct that the exceptions to the Tort Claims Act should not be read in a way that would 'nullif[y them] through judicial intrepretation,' *Id.* [679 F.2d] at 309, unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute. See *United States v. Yellow Cab Company*, 340 U.S. 543, 548 n.5, 71 S. Ct. 399, 403 n.5, 95 (1983) L Ed. 523 (1951); cf. *Block v. Neal*, __U.S.__ , __ , 103 S. Ct. 1089, 1094, 75 L. Ed. 2d. 67 (1983) (" 'The exemption of a sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its vigor by refinement by construction where consent has

> been announced' ") "*Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (*Cardozo J.*)). We think that the proper objective of a Court attempting to construe *one of the sub-sections* of 28 U.S.C. §2680 is to identify "those circumstances which are within the words and reason of the exception" no less and no more. See *Dalehite v. United States*, 346 U.S. 15, 31, 73 S. CT. 956, 965, 97 L. Ed. 1427 (1953). *Kosak v. United States, supra*. at 104 S. ct. 1523 n. 9 (Emphasis added).

It would be illogical to contest the fact that this Court in *Kosak v. United States, Supra*. has set forth a directive for the interpretation of all of those sub-sections contained within the ambit of 28 U.S.C. §2680, including sub-section (h). In reviewing those circumstances which are within the words and reasons of the exception, no less and no more, it is apparent that the District Court's determination in the matter of *Townsend v. Carmel, supra*. and the reasoning set forth by the District of Columbia Circuit Court in the matter of *Sami v. United States, Supra*. mandate the determination that the discretionary subsection not be read in conjunction with the "exception to the exception" contained in Section 2680 (h). A reading contrary to this would effectively eviscerate large portions of the sub-section, if not the entire sub-section, and would effectively overrule the congressional intent in the *1974 Amendment* to provide for redress against the government whenever its agents act under color of law so as to injure the public through searches and seizures that are conducted without warrants or with warrants issued without probable cause.

III. Alternatively, if indeed the *Gray v. Bell, supra*. determination is adopted by this Court, it is repectfully submitted that one does not have the discretion to intentionally and/or recklessly distort and misstate the nature and the quality of the informant and the investigation itself to a reviewing magisterial official. See *Heywood v. United States*, 585 F. Supp. 590 (D. Mass. 1984) and *Bergman v. United States*, 689 F.2d 789, 792 (8th Cir. 1982).

The treatment afforded the factual scenario at bar by the two District Court Judges as well as in the concurring Opinion by the Third District Court of Appeals is directly at odds with that of the Ninth Circuit Court of Appeals as set forth in the matter of *Wright v. United States* 719 F.2d 1032 (1983). Therein, the Plaintiff had been indicted for failing to file tax returns and for the filing of inproprietous tax returns. After the government dismissed the indictment and abandoned its prosecutions of Mr. Wright, a Federal Tort Claims Action followed. The Ninth Circuit, after noting the "decision whether or not to prosecute a given individual is a discretionary function", further noted that implementation of the decision to prosecute "including the nature of [the IRS Agent's] testimony before the Grant Jury, is not immune as a discretionary function." *Id.* at 1035.

It is respectfully asserted that the reasoning of the Ninth Circuit Court of Appeal is more appropriate in the matter now before this Court, especially in light of this Court's recent change in direction evidenced through the application of the "nature and quality" of the circumstances rationale now required by *Varig Airlines*.

CONCLUSION

WHEREFORE, due to the virtual dearth of authority concerning the interrelationship between 28 U.S.C. Section 2680 (h) and the discretionary function exception contained in 28 U.S.C. Section 2680 (a), and based upon the confusion engendered by the issue at bar as evidenced by the divergence in the majority opinion of the Third Circuit and the concurring opinion as well as the admitted confusion concerning the interrelationship question as set forth by the Second Circuit Court of Appeals, the D.C. Circuit Court of Appeals and the Ninth Circuit Court of Appeals, it is respectfully requested that a Writ of certiorari be granted.

Respectfully submitted,
STEPHEN F. DRYDEN,
ESQUIRE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1335 and 85-1490
(consolidated)

and

Ronnie Bradley,
Appellant in No.: 85-1490,

vs.

United States of America,
Appellee.

CERTIFICATE OF SERVICE

I, Stephen F. Dryden, a member of the Bar of the Supreme Court of the United States and counsel of record for Ronald Pooler and Ronnie Bradley, appellants herein, hereby certify that on July 18, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the attached Writ of Certiorari on each of the parties herein as follows:

On the United States of America, appellee herein, by depositing such copies in the United States Post Office, Juniper and Walnut Streets, Philadelphia, Pennsylvania, with first class postage, pre-paid, properly addressed to the post office address of Serina H. Dobson, Esquire, counsel of record for the United States of America, at 3310 U.S. Courthouse, Philadelphia, PA, 19106 and Solicitor General, Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated July 18, 1986.

Stephen Francis Dryden

STEPHEN F. DRYDEN, ESQ.
1346 Chestnut Street
Suite 1301
Philadelphia, PA 19107

APPENDIX "A"

CORRECTED COPY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1335

RONALD POOLER,

Appellant

v.

UNITED STATES OF AMERICA

(D.C. Civil No. 85-0035)

No. 85-1490

RONNIE BRADLEY,

Appellant

v.

UNITED STATES OF AMERICA

(D.C. Civil No. 85-0034)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: January 14, 1986
Before: SEITZ and GIBBONS,
Circuit Judges and
BARRY, *District Judge**

---

*Hon. Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

(Opinion Filed: MARCH 27, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Ronald Pooler and Ronnie Bradley appeal from orders entered by the district court dismissing their Federal Tort Claims Act (FTCA) suits because they are barred by the discretionary function exception in that Act. *See* 28 U.S.C. § 2680(a) (1982). Both suits arose out of a criminal investigation conducted by the Veterans Administration (VA) at the VA Medical Center in Coatesville, Pennsylvania in March of 1981.

I.

The Complaints

In separate complaints, Pooler and Bradley allege, and the government does not dispute, that they filed timely administrative claims with the Veterans Administration and that their claims were denied. Each complaint seeks recovery for an allegedly unlawful arrest and an allegedly unlawful prosecution. The arrests were made pursuant to warrants issued by a Pennsylvania judicial officer on charges that Pooler and Bradley sold marijuana on the premises of the VA hospital. Curtis Kimmel, a police officer employed by the VA, filed criminal charges against Pooler and Bradley at the culmination of an investigation into narcotics sales at the VA hospital.

In their complaints, Pooler and Bradley allege that Kimmel's investigation and his decision to file criminal charges were deficient in several respects. First, with respect to the investigation, they allege that Kimmel, in engaging the services of a VA employee, John Cantrell, to serve as an informant, selected an unreliable person with known past drug involvement, and of less than average mental capacity. Second, they allege that Kimmel failed to instruct Cantrell how to conduct himself so as to avoid violating the rights of persons that he would approach in his capacity as an informant. Third, they allege that Kimmel failed to verify, corroborate, or surveil any of the drug transactions entered into by Cantrell, Pooler and Bradley, and thus they aver that his conclusion that they sold marijuana depended solely on the unsubstantiated word of an unreliable informant.

With respect to the decision to file criminal charges, Pooler and Bradley allege that in bringing the charges to the attention of the distrtict attorney's office

Kimmel failed to disclose to that office the deficiencies in his investigative methods. They further allege that if those deficiencies had been revealed, the district attorney's office would not have initiated prosecution. Because of Kimmel's failure to disclose this information, they allege that they were arrested and detained until they could arrange for bail. The charges against them, however, were eventually nolle prossed. Finally, Pooler and Bradley claim that Kimmel did not file the charges against them in good faith, but filed them for the purpose of salvaging something from his investigation at the VA hospital and thus for the purpose of saving face.

II.

District Court Rulings

The district court dismissed the complaints at the pleading stage on the ground that the actions complained of fell within the discretionary function exception to the FTCA. The FTCA provides that despite the general rule that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674 (1982), it remains immune from liability for:

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The actions complained of are (1) Kimmel's manner of conducting the investigation, and (2) Kimmel's decision to file charges with the Pennsylvania authorities.

III.

Pooler and Bradley Contentions

On appeal, Pooler and Bradley contend that the district court erred in two respects. First, they argue that their suits are not barred by the discretionary function exception because the Kimmel actions of which they complain constitute mere operational functions not falling within the ambit of the exception. Second, they argue that, in any event, their suits are not barred because they fall within the proviso to the intentional tort exception which authorizes suits against the government for certain acts or omissions of law enforcement officers. 28 U.S.C. § 2680(h) (1982). We consider these contentions separately.

IV.

The Discretionary Function Exception

Dalehite v. United States, 346 U.S. 15 (1953), states that the language of section 2680(a) encompasses "the discretion of the executive or the administrator to act according to one's judgment of the best course." *Id.* at 34. It classified as falling within that section functions "[w]here there is room for policy judgment and decision. . . ." *Id.* at 36. The line was drawn between decisions made at "a planning level" and those made at "an operational level." *Id.* at 42. The former constituted discretionary functions; the latter did not. *Id. See also United States v. S.A. Empresa de Viacao Aerea Rio Grandese (Varig Airlines)*, 104 S.Ct. 2755 (1984); *General Public Utilities Corp. v. United States (GPU)*, 745 F.2d 239 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1227 (1985); *Bernitsky v. United States*, 620 U.S. 948 (3d Cir.), *cert. denied*, 449 U.S. 870 (1980). With the *Dalehite* test in mind, we consider the Kimmel actions of which Pooler and Bradley complain.

A. Investigative Methods

Pooler and Bradley do not here contend that the federal officials in charge of the VA hospital lacked discretion to conduct investigations of drug distribution on the hospital grounds, nor do they contend that those officials lacked the authority to assign Kimmel to conduct that investigation. The urge, however, that at Kimmel's level planning and policy were at an end, and that he was engaged solely in operations. In support of that contention they rely heavily upon *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975). In *Downs* the survivors of the deceased victims of an airline hijacking brought suit against the United States under the FTCA claiming that the deaths of the passengers were caused by the negligence of the FBI agent in handling the situation. The United States contended that because the agent was required to exercise judgment in dealing with the hijacker, the discretionary function exception applied. Although noting that "Congress intended 'discretionary functions' to encompass those activities which entail a formulation of governmental policy, whatever the rank of those so engaged," the court held that the actions of the FBI agent did not come within the exception because he was *not* involved in formulating policy but was only directing the actions of others. *Id.* at 997.

We need not address the question whether in circumstances such as those in *Downs* this court would find that the discretionary function exception applied. We are not here presented with the negligent implementation of a policy, which has been determined by others, and which results in physical injury or death.[1] In this case Kimmel was placed in

1. *But cf.* Amato v. United States, 549 F. Supp. 863 (D.N.J. 1982), *aff'd mem.*, 729 F.2d 1445 (1984).

charge of an investigation, and was required to decide how that investigation would be pursued. That required consideration of the use and availability of potential informants, and of the competing uses of personnel who might be needed for surveillance. In *Bernitsky*, we observed with respect to the activities of a coal mine inspector that,

> [d]ecision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments.

602 F.2d at 955. In *GPU*, we applied the *Bernitsky* holding to bar recovery against the United States on a claim that the investigation by the Nuclear Regulatory Commission of the safety of the Three Mile Island electric generating plant was inadequate. 745 F.2d at 245. These cases control. Although Kimmel is not a high-level official, he had to exercise judgment as to the policy decision to use an informant and as to the extent of control which should be maintained over the selected informant. If the issue was the use of an undercover agent or informant whose known tendencies toward violence suggested a risk of physical harm either to the targets of an investigation or to all bystanders, the case might well be different. In addition, if the complaint were that agents of the government in the course of an investigation had violated constitutional rights or federal statutes, the outcome would be different since federal officials do not possess discretion to commit such violations. But when the sole complaint is addressed, as here, to the quality of the investigation as judged by its outcome, the discretionary function should, and we hold, does apply. Congress did not intend to provide for judicial review of the quality of investigative efforts.

B. Decisions to Prosecute

Kimmel's decision to file complaints with the Pennsylvania authorities is an *a fortiori* example of a discretionary function. There is no allegation that Kimmel or the other VA officials who decided to make the charge of sale of drugs on VA premises lacked authority to do so. *See, e.g., Hatahley v. United States*, 351 U.S. 173 (1956); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974). As one court notes,

> Prosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception.

Gray v. Bell, 712 F.2d 490, 513 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (footnote omitted). *See also Wright v. United States*, 719 F.2d 1032 (9th Cir. 1983); *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

IV.

The Intentional Tort Proviso

The intentional tort exception in the Federal Tort Claims Act retains the immunity of the United States in cases

> any claim arising out of . . . false arrest, [or] malicious prosecution . . . *provided*, that with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of . . . false arrest . . . or malicious prosecution.

involving 28 U.S.C. § 2680(h). The statute defines an investigative or law enforcement officer as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Pooler and Bradley contend that their complaints state claims falling within the quoted proviso. They contend, further, that even if the actions of which they complain fall within the discretionary function subsection, the later enactment of the proviso, *see* Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, must be considered a pro tanto amendment.

Only one case has come to our attention that specifically addresses the interrelationship between the discretionary function exception and the intentional tort proviso. It holds that before suit may be maintained against the United States, even for an intentional tort falling within the proviso, the plaintiff must first clear the hurdle of the discretionary function exception. *Gray*, 712 F.2d at 507-08. *See also Wright*, 719 F.2d at 1034-36. Thus, suit can only be maintained if it is first shown that the government actor was not exercising discretion.

Ames v. United States, 600 F.2d 183, 195 n.3 (8th Cir. 1977), and *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir. 1977), read the proviso as inapplicable to United States attorneys and to security personnel in military exchanges because these federal officers are not empowered to execute searches, seizures, and arrests for violations of federal law. *See also United States v. Rubin*, 573 F. Supp. 1123, 1124-25 (D. Colo. 1983).

In this case, Pooler's and Bradley's complaints, read in the light most favorable to them, charge that Kimmel is an officer of the United States "empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law." 28 U.S.C.

§ 2680(h). No matter how generously we read them, however, the complaints do not charge that Kimmel committed an intentional tort while executing a search, seizing evidence, or making an arrest. We read the 1974 amendment to section 2680(h) as addressing the problem of intentionally tortious conduct occurring in the course of the specified government activities. It is in the course of such activities that government agents come most directly in contact with members of the public. The government places them in such a position, thereby exposing the public to a risk that intentionally tortious conduct may occur. That Congress intended to deal only with conduct in the course of a search, a seizure, or an arrest is confirmed by the sparse legislative history of the 1974 amendment. The Senate Report on the amendment states that the proviso was enacted to provide a remedy against the United States in situations where law enforcement officers conduct "no-knock" raids or otherwise violate the fourth amendment. *See* S. Rep. No. 588, 93d Cong., 2d Sess. 2-3 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789, 2790-91.

Reading the intentional tort proviso as limited to activities in the course of a search, a seizure or an arrest as a practical matter largely eliminates the likelihood of any overlap between section 2680(a) and section 2680(h). It is hard to imagine instances in which the activities of officers engaging in searches, seizures or arrests would be anything other than operational. When this court is presented with an instance to the contrary, it can address the question answered by the District of Columbia Court of Appeals in *Gray*. For present purposes, we hold only that the Pooler and Bradley complaints do not state claims falling within the proviso to section 2680(h) because no federal officer is charged with a tort in the course of a search, a seizure, or an arrest.

V.

Conclusion

The investigative decision made by Kimmel and his decision to file criminal complaints fall within the discretionary function exception, section 2680(a), to the FTCA. Those activities do not fall within the proviso to section 2680(h). The judgments appealed from, dismissing the complaints for failure to state a claim against the United States under the Federal Tort Claims Act, will therefore be affirmed.

SEITZ, *CIRCUIT JUDGE*, concurring.

While I agree with the result reached by the majority, I write separately because of a different perception of the current state of the controlling law, particularly as applied to the present circumstances, and of the scope of section 2680(h), the intentional torts proviso of the Federal Tort Claims Act (FTCA).

I do not believe that the "planning/operational" distinction employed by the majority expresses the present state of the test for the application of the discretionary function exception. The Supreme Court's recent decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S.Ct. 2755 (1984), "has reduced some of the uncertainty generated by the numerous courts of appeals' decisions that have wrestled with the vague contours of the discretionary exception." *General Public Utilities Corp. v. United States*, 745 U.S. 239 (3d Cir. 1984). In *Varig Airlines*, the Court reaffirmed the holding of *Dalehite v. United States*, 346 U.S. 15 (1953), which had often been called into question in recent years. It noted that it is "impossible...to define with precision every contour of the exception," *Varig*

Airlines, 104 S.Ct. at 2764, and quoted *Dalehite's* maxim that "'where there is room for policy judgment and decision there is discretion.'" 104 S.Ct. at 2764, *quoting* 346 U.S. at 36. The Court went on:

> [f]irst, it is the nature of the conduct, rather than the status of the actor, that governs whether the...exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers '[n]ot only agencies of the government...but all employees exercising discretion. 346 U.S. at 33. Thus, the basic inquiry concerning the application of the...exception is whether the challenged acts of the Government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from liability.

104 S.Ct. at 2764.

I believe that the *Varig Airlines* test is the one that must be applied to Kimmel's actions to determine whether the discretionary function exception applies. This is particularly important in the case of the alleged intentional torts involved in Kimmel's decision to seek prosecution of the subjects of his investigation, because in that context the planning/operational distinction is not easily applied.

The discretionary function exception has historically been applied to "prosecutorial decisions as to whether, when and against whom to initiate prosecution [because such decisions] are quintessential examples of governmental discretion in enforcing the criminal law." *Gray v. Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). *See also, Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983); *Smith v. United States*, 375 U.S. 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

The cited cases, however, involve prosecutorial decisions made by prosecuting authorities, not decisions by law enforcement agents to seek prosecution based on the results of an investigation. Our task under *Varig Airlines*, then, is to determine whether Kimmel's decision to bring charges against Pooler and Bradley were "of the nature and quality that Congress intended to shield from liability." 104 S.Ct. at 2764.

In doing so, it is necessary to parse the activities of Kimmel the head of an investigation from those of Kimmel the planner or operative so that the inquiry focuses on the precise activity complained of. Viewed in this context, it is clear that the process of assessing the results of a protracted investigation and deciding whether those results warrant presentation to prosecuting authorities is closely analogous to a prosecutor's exercise of prosecutorial discretion, and similar policy considerations are present. Since *Varig Airlines* directs us to analyze the "nature and quality" of the activity "rather than the status of the actor," *id.*, I would conclude that the discretionary function exception applies to Kimmel's decision to bring charges. Plaintiffs' claims are therefore barred by that exception "whether or not the discretion [was] abused," 28 U.S.C. § 2680(a), unless, as plaintiffs claim, the intentional tort proviso can be read to override the discretionary function exception.

There are few cases interpreting the scope of section 2680(h) and even fewer addressing the interrelationship between that section and the discretionary function exception. The intentional tort proviso was enacted by Congress in 1974. Several incidents in which federal agents engaged in "abusive, illegal and unconstitutional 'no-knock' raids," Sen. Rep. 93-588, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2789, 2790, motivated Congress to

amend the FTCA to prevent "future abuses." *Id.* The amendment was generally intended to be coextensive with actions brought under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and thus to provide a cause of action against the government whenever *Bivens* would provide one against the individual federal employee. Sen. Rep. 93-588, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 2791. *See also Carlson v. Green*, 446 U.S. 14, 19-20 (1979).

However, the proviso was not, as the majority holds, intended to be limited in scope to the types of behavior that provided the initial motivation for its passage:

> This whole matter was brought to the attention of the Committee in the context of the Collinsville raids, where the law enforcement abuses involved Fourth Amendment constitutional torts. Therefore, the Committee amendment would submit the Government to liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause. However, the Committee's amendments should not be viewed as limited to constitutional tort situations but would apply to any case in which a Federal law enforcment agent committed the tort while acting within the scope of his employment or under color of Federal law.

Sen. Rep. 93-588, *reprinted in* 1974 U.S. Code Cong & Admin. News at 2791.

Because Congress intended section 2680(h) to encompass activities outside the arrest, search, and seizure context, *see e.g., Carlson v. Green, supra* (§ 2680(h) allows action for death of prisoner due to

intentional indifference of federal prison officials motivated by racial prejudice), this case forces us to confront the interface between sections 2680(a) and 2680(h).

Congress gave no guidance in the legislative history of the intentional tort proviso respecting a line of demarcation between that proviso and the discretionary function exception. Other courts that have faced the situation where an intentional tort has allegedly been committed by a federal law enforcement officer who was arguably exercising a discretionary function have expressed concern that the provisions should not "be read to eviscerate each other." *Caban v. United States*, 671 F.2d 1320, 1234 (2d Cir. 1982). In *Caban*, the court declined to classify "as discretionary the basically mechanical duty to ascertain whether an applicant meets the minimal standards for entry into this country [because to do so would] jeopardize a primary purpose for enacting § 2680(h)." *Id.*

In the case before us, however, where the alleged intentional tort took place in a context that involved the performance of a discretionary function, I would "reject the contention that intentional tort claims based on the acts of 'investigative or law enforcement officer[s]' may never come within the purview of the discretionary function exception." *Gray v. Bell*, 712 F.2d 490, 507 (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). *Gray* recognized that some challenged conduct, including claims of malicious prosecution, might involve the exercise of a discretionary function and thus be barred by section 2680(a). The court held nevertheless that since statutes waiving the sovereign immunity of the United States must be "'construed strictly in favor of the sovereign,'" 712 F.2d at 508, *quoting McMahon v. United States*, 342 U.S. 25, 27 (1951), claimants must clear the discretionary function hurdle *and* satisfy the requirements of the

intentional tort proviso in order to bring such claims under the FTCA.

I stress that the activity giving rise to the alleged malicious prosecution in this case involved the evaluation of the results of a wideranging and protracted investigation. We are not called upon to decide whether every decision by a law enforcement officer to seek prosecution of an individual per se involves a discretionary function and is therefore barred by sectin 2680(a) despite the potential applicability of section 2680(h). The essence of the *Varig Airlines* test is that each situation must be analyzed independently. I would hold, however, that where the discretionary function exception applies, it precludes a suit that otherwise might satisfy the intentional tort proviso. Since Kimmel's decision to seek prosecution involved the exercise of a discretionary function, it follows that the claims asserted under the intentional tort proviso are barred.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 85-1335 and 85-1490

POOLE, RONALD, Appellant in No. 85-1335
BRADLEY, RONNIE, Appellant in No. 85-1490
v.
UNITED STATES OF AMERICA
(D.C. Civil No. 85-0035 and 85-0034)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ and GIBBONS, *Circuit Judges* and BARRY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 14, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered May 17, 1985, in D.C. Civil No. 85-0035 and entered July 11, 1985, in D.C. Civil No. 85-0034, be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

March 27, 1986

---

*Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 85-1335

POOLER, RONALD,

Appellant

v.

UNITED STATES OF AMERICA
(D.C. Civil No. 85-0035)

No. 85-1490

BRADLEY, RONNIE,

Appellant

v.

UNITED STATES OF AMERICA
(D.C. Civil No. 85-0034)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: April 22, 1986

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD POOLER	:	CIVIL ACTION
v.	:	
THE UNITED STATES OF AMERICA	:	No. 85-0035

OPINION

LUONGO, *Ch.J.* MAY 16, 1986

This is an action against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671 et seq. The gravamen of plaintiff's complaint is that he was falsely arrested on drug charges as a result of a negligent investigation conducted by the Veterans Administration (VA). The government has moved to dismiss the complaint under the discretionary function exception to the FTCA. Because I conclude that the decision to initiate criminal charges and the decision as to the proper means of investigating suspected criminal conduct are discretionary functions within the meaning of 28 U.S.C. §2680(a), I will grant the motion to dismiss.

I.

Plaintiff Ronald Pooler was employed at the Veterans Administration Medical Center in Coatesville, Pennsylvania until the time of his arrest in March, 1982. In the year preceding plaintiff's arrest the VA conducted an investigation into reports of the distribution and use of controlled substances at the Medical Center. When the inquiry proved unsuccessful, VA officials decided to attempt an undercover operation using the services of an informant.

VA officials who were involved in the decision to implement an undercover operation were: James L. G. Parsons, II, Director of the Medical Center, Peter Mango, Chief of Police at the Medical Center, and Curtis Kimmel, a VA detective. In December,

1981, Mango advised Parsons of his belief that a drug problem existed at the Medical Center. Parsons approved Mango's request for authorization to conduct an investigation, and Mango assigned Detective Kimmel to conduct the probe.

Plaintiff alleges that Kimmel's approach to the investigation was deficient in several respects. Plaintiff alleges that Kimmel selected for use as an informant a VA employee, John Cantrell, who had acknowledged past drug involvement and who exhibited less than average mental capacity. It is further alleged that during the course of the investigation, Kimmel failed to instruct the informant as to which individuals he should observe and as to methods of avoiding violating the rights of such persons. Plaintiff also claims that Kimmel failed to obtain corroborative evidence with respect to Cantrell's allegation that plaintiff sold him drugs: Kimmel did not personally observe, nor did he direct others to witness, the alleged transactions between plaintiff and the informer.

As a result of the undercover investigation, Kimmel filed two criminal complaints against plaintiff on March 18, 1982. A district justice found probable cause and issued a warrant for plaintiff's arrest. After his arrest, plaintiff was required to post bail to obtain release. The charges against plaintiff were *nolle prossed* by the Chester County District Attorney on August 24, 1982. Plaintiff denies participation in the alleged drug transactions.

II.

The discretionary function exception to the FICA bars suit against the United States on:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §2680(a). On the few occasions the Supreme Court has considered the discretionary function exception, the Court has accorded the exception a broad reading. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Court rejected claims arising out of a disastrous explosion of ammonium nitrate fertilizer intended for shipment to Europe in the aftermath of World War II. Declining to establish a precise standard for application of the exception, the Court ruled that the exception covered at least "the initiation of programs and activities." 346 U.S. at 35. Moreover, the Court held the exception applicable to "determination made by executives or administrators in establishing plans, specifications, or schedules of operations." *Id.* at 35-36 (footnote omitted). As the Court explained:

> Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of §2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Id. at 36 (footnote omitted). Applying that standard to the facts before it, the Court ruled that all the government's alleged acts of negligence — including *inter alia* the improper labeling of fertilizer bags — were discretionary functions. The Court reasoned that the challenged decisions "were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." *Id.* at 42.

The Supreme Court recently reaffirmed the principles of *Dalehite v. United States* in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S.Ct. 2755 (1984). There the Court ruled that the exception barred actions based on the Federal Aviation Administration's certification of aircraft for commercial use. The Court held that the decision to

adopt a "spot check" system for reviewing a manufacturer's compliance with applicable regulations was a discretionary function. The Court heavily emphasized the discretionary character of an agency's regulation of private conduct:

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.

104 S.Ct. at 2768. In short, the Court found that the "nature and quality" of the decision to adopt a "spot check" system classified such a decision as a discretionary function.

The Court also ruled that the acts of FAA employees implementing the spot check program were protected by the exception. The Court noted that individuals assigned to review a given manufacturer's compliance with applicable safety standards were specifically empowered to decide the extent to which the manufacturer could be trusted to have observed such regulations.

In this circuit, our court of appeals recently examined the scope of the discretionary function exception in *General Public Utilities Corporation v. United States*, 745 F.2d 239 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3599 (Feb. 19, 1985). In that case, the court held barred the claims of owners of the Three Mile Island nuclear plant against the government because of the Nuclear Regulatory Commission's failure to warn then of equipment defects. The court reasoned that the character of the function performed by the agency — regulation of the nuclear industry after assessment of information gathered from nuclear facilities — required that the agency's decision whether to report specific data be held a discretionary function. The court emphasized that the nature of the governmental activity, and not the

availability of other courses of action, determines whether the conduct is discretionary.

> The exemption from the Tort Claims Act is based on the nature of the governmental discretionary function, not whether there is an option to choose. Regulatory activities are within the exemption, not because alternatives exist in particular circumstances, but because of the fundamental character of the role assigned to the agency.
>
> If a government employee performing a discretionary function acts negligently, the exemption remains applicable even though the activity constitutes an abuse of discretion. As the statute itself provides, discretionary functions are exempt "whether or not the discretion involved be abused." 28 U.S.C. §2680(a).

745 F.2d at 245.

III.

Apart from general pronouncements on the subject of the discretionary function exception, the courts have provided little insight into application of the exception to the investigative conduct of law enforcement officials. In this circuit, *Bernitsky v. United States*, 620 F.2d 948 (3d Cir.), *cert. denied*, 449 U.S. 870 (1980), is the most significant appellate ruling. In *Bernitsky*, a coal company brought suit after portions of its mine collapsed, causing substantial damage to equipment left in the mine. At the time of the collapse, the company was forbidden access to the mine or its equipment because of a Withdrawal Order issued by the Mining Enforcement and Safety Administration. The Withdrawal Order was based on a Notice of Violation regarding toilet facilities which the company had failed to remedy for seven months despite three extensions of time. The company claimed that closure of the mine was unreasonable under the circumstances, and brought suit under the FTCA.

The court of appeals held the suit barred under the discretionary function exception. The court noted that applicable regulations vested discretion in mine inspectors to determine the

time during which a violation (other than one posing imminent danger) must be abated. In view of the "judgmental character" of the decision as to a reasonable length of time to correct a violation, the court declined to substitute its judgment for that of the mine safety officials. The court concluded:

> Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments.

620 F.2d at 955.

Following *Bernitsky*, the court in *Amato v. United States*, 549 F. Supp. 863 (D.N.J. 1982), *aff'd mem.*, 729 F.2d 1445 (1984), ruled that FBI agents were acting within the scope of the exception when they delayed arresting members of a conspiracy until the suspects committed a bank robbery. Applying the planning level/operational level distinction derived from *Dalehite v. United States* and followed by decisions of our court of appeals, the court concluded that the agents were engaged in planning activity when they declined to charge the suspects with lesser offenses on the basis of inconclusive evidence available before the robbery.

A similar conclusion was reached by the Court of Appeals for the Fifth Circuit in *Flammia v. United States*, 739 F.2d 202 (5th Cir. 1984). The Fifth Circuit, with the benefit of the Supreme Court's *Varig* decision, ruled that the decision of the Immigration and Naturalization Service to admit a Cuban national into this country was discretionary. The court deemed the relevant inquiry to be whether the challenged conduct was of a "nature and quality that Congress intended to shield from tort liability." 739 F.2d at 204, *quoting Varig*, 104 S.Ct. at 2765. Finding that the INS has "broad statutory discretion" to admit excludable foreign nationals into this country, the court ruled that *Varig* precluded judicial review of the agency's decision. The court also ruled that *Varig* precluded liability based on the "specific operational decision" to admit the foreign national involved in *Flammia*. Having characterized the function of deciding whether to admit foreign nationals as discretionary, the court rejected the attempt to draw a distinction between high-level decisions and

specific operational decisions. In this regard, the Fifth Circuit took heed of the Supreme Court's declaration that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig*, 104 S.Ct. at 2765.

Research has disclosed, however that circuit court treatment of law enforcement officers' conduct has not been uniform.

For example in *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975), the court held that the exception did not apply to a tort suit which challenged the manner in which FBI agents responded to a hijacking. The court limited application of the exception to (1) cases in which government agents, acting with due care, implement a statute or regulation and (2) cases in which government agents formulate policy. To determine whether government agents are formulating policy, the court looked to the nature and quality of judgment at issue, not to the governmental function for which such a decision was made.

Applying that test to the case before it, the Sixth Circuit ruled that the FBI agents were not formulating government policy when they decided to disable a captive aircraft with hostages on board. The court reasoned that governmental policy had already been articulated in an FBI handbook.

The Sixth Circuit found support for its conclusion in civil rights cases reviewing the legality of police searches, seizures, and arrests. From that body of precedent the court deduced that when a response to a particular situation does not have policy overtones, courts have "scrutinized the day-to-day activities of law enforcement officers." *Downs*, 522 F.2d at 997. The court rejected the argument that the making of an arrest is a discretionary act, reasoning that, as in civil rights cases, "the fiction that making an arrest is not 'discretionary' is maintained because protection of personal liberties is thought to outweigh the danger of less effective law enforcement out of fear of personal tort liability." *Id.* at 998.

Relying on *Downs*, the District Court for the Eastern District of Michigan has ruled that the exception does not bar suit for a death caused by an informant in the FBI's control. In *Liuzzo*

v. United States, 508 F. Supp. 923 (E.D. Mich. 1981), the plaintiffs alleged that their mother was killed because the FBI recruited, but failed to train or supervise, an informant with known dangerous propensities. The plaintiffs also alleged that the FBI had notice of, and authorized the informant, a Ku Klux Klan member, to provoke or participate in violence toward civil rights protestors such as the plaintiffs' decedent.

On a motion to dismiss, the court held that the alleged negligence of the FBI officers in implementing the Bureau's policy regarding informants was the sort of day-to-day judgment that *Downs* held outside the discretionary function exception. Because the agents were not formulating policy when they responded to the various circumstances presented, the exception did not preclude judicial review of the propriety of their handling of the informant.

IV.

To decide whether the discretionary function exception bars suit for the alleged negligence of VA officials in the case before me, I must consider whether the challenged conduct is "of the nature and quality that Congress intended to shield from tort liability." *Varig*, 104 S.Ct. at 2765. After considering the facts of this case in light of the Supreme Court's recent pronouncement, the pre-*Varig* caselaw, and particularly our court of appeals' decision in *Bernitsky*, I conclude that the challenged conduct is a discretionary function.

I note at the outset that this lawsuit involves a challenge to both the officials' investigative techniques and their decision to initiate criminal charges against the plaintiff. The latter aspect of the officials' behavior has *traditionally been considered a quintessentially discretionary act*. *Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965); *Accardi v. United States*, 435 F.2d 1239 (3d Cir. 1970); *Blessing v. United States*, 447 F. Supp. 1160, 1179 & n.28 (E.D. Pa. 1978). Nothing in *Varig* or other recent cases suggests that *filing the criminal complaint* was not a discretionary act, thus

I hold that plaintiff's complaint must be dismissed to the *extent it challenges the decision to bring such charges*.

I conclude also that the VA officials' conduct during the investigation, including their decision to accept the services of an informant with limited mental capacity, is a discretionary function. As the Third Circuit specifically ruled in *Bernitsky*: "Decision making as to investigation and enforcement, particularly where there are different types of enforcement action available, are discretionary judgements." 620 F.2d at 955. While it can be said that the mine safety inspectors in *Bernitsky* enjoyed slightly broader discretion to decide appropriate enforcement action, the nature of the governmental conduct — *investigation and enforcement of regulations of private conduct — is the same as in the instant case*.[1]

Further support for this position is found in *Varig* and the Third Circuit's analysis of *Varig* in *General Public Utilities Corporation v. United States, supra*. In *Varig*, the Supreme Court made clear that the governing inquiry is whether the governmental function pursued through an allegedly negligent decision is discretionary. With respect to the FAA's decision as to the extent it would oversee private manufacturers' compliance with safety standards, the Court ruled that the regulatory character of the challenged conduct classified it as a discretionary function. Similarly, in *General Public Utilities*, the court emphasized that

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1. My decision in *Miller v. United States*, 530 F. Supp. 611 (E.D. Pa. 1982), is not to the contrary. In that case, the government was sued for failure to place certain persons in the Federal Witness Protection Program. The government moved to dismiss the complaint under the discretionary function exception. I denied the motion because the complaint alleged that the government had made the decision to protect those individuals, but that government agents *negligently failed to execute that decision*. In addition, because of the then-undeveloped state of the record, I declined to resolve the merits of the government's argument that the decision whether to protect a witness is inherently bound up with the discretionary function of the prosecutor. I note that at a later stage of the *Miller* litigation, Judge Lord ruled that the developed record did not support the plaintiffs' assertion that the government had decided to protect the individuals. *Miller v. United States*, 561 F. Supp. 1129, 1131 (E.D. Pa. 1983), *aff'd mem.*, 729 F.2d 1448 (3d Cir. 1984).

the exception "is based on the nature of the governmental discretionary function," and is not forfeited by the negligence of an employee performing such a function. 745 F.2d at 245. The court then went on to hold that the Nuclear Regulatory Commission's regulatory function was a discretionary one.

The same reasoning applies to the *VA's role as regulator of the conduct of persons on VA premises*. Congress has authorized the Administrator of Veterans' Affairs, for the purpose of maintaining law and order on VA property, to establish rules and regulations, to employ special police, and to authorize such special officers to carry firearms. Special investigators, while on VA property, are authorized to enforce both rules and regulations promulgated by the VA and Federal statutes for the protection of persons and property. 38 U.S.C. §218. With respect to conduct on VA property, therefore, the VA is entitled to the range of discretion properly accorded other law enforcement agencies.

I conclude, moreover, that when seeking to enforce a criminal statute through the use of an informant, law enforcement agencies are exercising a discretionary function under the *Varig* formulation. Although civil rights litigation has compelled the courts to review police conduct for the purpose of protecting individual rights, the judiciary's limited role as Constitutional guardian does not reflect an institutional competence to weigh risks attendant to the various methods of ferreting out crime. Plaintiff's suggestion that law enforcement agencies should decline to employ informants of questionable physical, mental, or moral condition is particularly suspect. On countless occasions, the government has used the testimony of admitted criminals, perjurers, and drug abusers to obtain the conviction of the informants' former cohorts. To require that the government rely only upon witnesses of sterling character would intolerable impede the government's law enforcement effort. In the instant case, it makes no difference that the decision to employ Mr. Cantrell was not made by high-level administrators; the status of the decisionmakers does not alter the basic character of their judgment, a determination of the appropriate means of law enforcement.

Plaintiff's final contention, raised at oral argument, is that he is entitled to relief under the "investigative or law enforcement officer" proviso of 28 U.S.C. §2680(h). Section 2680(h) excepts from the FTCA:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

As the Court of Appeals for the District of Columbia Circuit has already ruled, however, §2680(a) bars suit with respect to discretionary governmental functions even if the discretionary conduct would constitute a tort covered by the proviso to §2680(h). *Gray v. Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1593 (1984). Plaintiff's argument that the holding of *Gray v. Bell* should be rejected is not convincing. Although the instant case demonstrates that *some activities of law enforcement officers are discretionary functions*, it is not necessary to construe the proviso to §2680(h) as a *pro tanto* repeal of the discretionary function exception to give the proviso its intended effect. Under the interpretation advanced by the District of Columbia Circuit which I follow, the prime target of the proviso — violation of constitutional rights by law enforcement officers — remains actionable.[2]

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2. At oral argument, plaintiff made reference to footnote nine of the Supreme Court's opinion in *Kosak v. United States*, 104 S.Ct. 1519, 1523 (1984). Plaintiff's reference is unhelpful. In that footnote, the Court, in the context of a discussion of §2680(c), merely stated that the exceptions to the FTCA should

In short, I hold that both the VA officials' decision as to the proper investigative techniques and their determination to initiate criminal charges against the plaintiff are discretionary governmental functions. Because plaintiff's complaint is barred by the discretionary function exception, this court lacks jurisdiction over the case. *Griffin v. United States*, 500 F.2d 1059 1063 (3d Cir. 1974). I will therefore dismiss plaintiff's complaint.

Ch.J.

NOTES *(Continued)*

be interpreted according to their language and purpose, and not as narrow exceptions to the broadly-construed principle of sovereign immunity. The Supreme Court did not suggest that it rejected the Third Circuit's treatment of the FTCA entirely, particularly in view of the Court's affirmance of the Third Circuit's *Kosak* decision.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

POOLER, RONALD	:	CIVIL ACTION
v.	:	
THE UNITED STATES OF AMERICA	:	No. 85-0035

ORDER

This 16th day of May, 1985, it is

ORDERED that the Motion of the United States of America to dismiss the Complaint is GRANTED.

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Ch. J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRADLEY, RONNIE	:	CIVIL ACTION
v.	:	
THE UNITED STATES OF AMERICA	:	No. 85-0034

MEMORANDUM AND ORDER

DITTER, *J.* July 10, 1985

In this action plaintiff alleges negligent and/or tortious conduct on the part of United States' employees. The facts, viewed in the light most favorable to plaintiff, are as follows. Alarmed by the sale of illegal drugs in the Coatesville Veterans Administration Hospital, James L. G. Parsons, II, director of the hospital, and Peter J. Mango, chief of the hospital's police force, decided to conduct an undercover investigation. Curtis Kimmel, a V.A. police officer, was assigned to the undercover investigation and John Cantrell, a hospital clothing clerk, was utilized as an informant. As is the case with some informants, Cantrell's reputation was not as a vestal virgin it being alleged that he was known to be both mentally deficient and a drug user.

Shortly after commencement of Cantrell's undercover activities, and based upon information supplied by Cantrell, Officer Kimmel caused a criminal complaint to be filed against plaintiff. This complaint charged plaintiff with "possession, possession with intent to deliver and delivery of a controlled substance, to wit: marijuana." Because of weaknesses in the government's evidence, this criminal action was *nolle prossed* by the Chester County District Attorney's Office. However, the allegation that plaintiff was a drug dealer did result in plaintiff's dismissal from employment at the V.A. hospital.

Based on the foregoing, plaintiff caused a *Bivens* type action to be filed against Curtis Kimmel, John Cantrell, and James Parsons. Approximately two weeks prior to the scheduled trial date

for the *Bivens* action, plaintiff filed this complaint asserting a cause of action directly against the United States pursuant to the Federal Tort Claims Act ("FTCA"). 28 U.S.C. §1346(b). Presently before me is the government's motion to dismiss the FTCA action. In this motion, the government asserts the conduct complained of is within the "discretionary function" exception to the waiver of sovereign immunity contained in the FTCA. For the reasons that follow, the government's motion will be granted.

The "discretionary function" exception[3] to the Federal Tort Claims Act, 28 U.S.C. §2680(a), has resulted in much litigation with judicial precedent difficult to harmonize. *See Bernitsky v. United States*, 620 F.2d 948, 951 (3d Cir. 1980). On the one hand, cases recognize that statutes waiving a sovereign's immunity from suit "are to be strictly construed in favor of the sovereign" *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19 (1951). On the other hand, blind application of the "discretionary function" language would completely abrogate the waiver of immunity contained in 28 U.S.C. §1346(b) because virtually all governmental actions require some decision making and, therefore, the exercise of some discretion. *See Smith v. United States*, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841, 88 S. Ct. 76 (1967) ("If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials are driving, the federal courts must reject an absolutist interpretation. . . ."). *See also Downs v. United States*, 522 F.2d 990, 995 (6th Cir. 1975), *Liuzzo v. United States*, 508 F. Supp. 923, 931 (E.D. Mich. 1981). This conflict, together with Supreme Court decisions Chief Justice Burger has characterized as "not follow[ing] a

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3. As an initial matter plaintiff has argued that because he has alleged malicous prosecution and false arrest on the part of an "investigative officer," section 2680(h) applies to the exclusion of the discretionary function exception of section 2680(a). However, for the reasons expressed by the United States Court of Appeals for the District of Columbia, I refuse to adopt such a construction of the statute. *See Gray v. Bell*, 712 F.2d 490, 507-08 (D.C. Cir. 1983). *See also, Caban v. United States*, 671 F.2d 1230, 1234 (2d Cir. 1982) ("We do not think, however, that either section should be read to eviscerate the other.").

straight line," *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S. Ct. 2755, 2764 (1984), has resulted in judicial precedent that does not "comprise a particularly coherent body of case law." *Blessing v. United States*, 447 F. Supp. 1160, 1172-73 (E.D. Pa. 1978) (comparing various cases).

One of the earliest, and easily the most famous case on the subject is *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956 (1953). In *Dalehite* the Supreme Court characterized discretionary functions as those functions in which there was "room for policy judgment and decision." *Id.* at 36, 73 S.Ct. 968. Continuing, the Court found the challenged conduct could not "subject the Government to liability [because] the decisions . . . were all responsibly made at a planning rather than operational level." *Id.* at 42, 73 S.Ct. 971.

From this Supreme Court language was born what is termed the planning level/operational level test for use in determining the contours of the discretionary function exception. *See Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982); *Bryson v. United States*, 463 F. Supp. 908, 911 (E.D. Pa. 1978). Under this test all decisions concerning the "feasibility or practicability of governmental programs" or "considerations of public policy, calling for a balance of such factors as cost of Government programs against the potential benefit" were held to be "planning level" decisions and protected by the discretionary function exception. *See Griffin v. United States*, 500 F. 2d 1059, 1064 (3d Cir. 1974). Conversely, decisions which merely addressed how best to implement planning level decisions were defined as "operational decisions" not sheltered by the discretionary function exception.

From the beginning the planning level/operational level test proved troublesome. As stated by Judge Becker, in one of the most comprehensive opinions on the subject, the "planning/operational distinction, instructive as it may be on a theoretical level, can become exceedingly problematic when applied to concrete facts." *Blessing v. United States*, 447 F. Supp. 1160, 1173 (E.D. Pa. 1978). Nonetheless, and apparently because this test does provide for many cases an accurate and easily applied

standard, use of this test can still be found in reported decisions. *See Payne v. United States*, 730 F.2d 1434 (11th Cir. 1984); *Grunnet v. United States*, 730 F.2d 573 (9th Cir. 1984); *Jablonski v. United States*, 712 F.2d 391 (9th Cir. 1983); *Morris v. United States*, 585 F. Supp. 1543 (D. Mo. 1984). Its continued use, however, is of questionable propriety in that the most recent Supreme Court pronouncement on the discretionary function exception fails to even mention the test. *See Varig Airlines*, 104 S. Ct. 2755. Similarly, recent Third Circuit decisions on the discretionary function exception have not utilized the planning/operational distinction. *See General Public Utilities Corp. v. United States*, 745 F.2d 239) 3d Cir. 1984).[4]

In place of the planning/operational distinction, the Supreme Court in *Varig Airlines*, and the Third Circuit in its recent decisions utilize the reasoning employed by the Sixth Circuit in *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975). In *Downs*, the plaintiffs alleged FBI agents were negligent in the handling of an airplane hijack incident. As a result of this negligence, the hijackers murdered plaintiffs' decedents. After reviewing the relevant case law and legislative history, the Sixth Circuit rejected the planning level-operational level test. In so doing the *Downs* court noted that the basis undergirding the test, "the status of the official making a judgment," was "not a sufficient test for determining whether a government employee's actions are within the exception." *Downs*, 522 F.2d at 997. Rather, "the basic question concerning the exception is whether the judgments of a Government employee are of 'the nature and quality'

4. Even prior to *Varig Airlines*, the Third Circuit characterized the planning level-operational level distinction as an ineffective "semantic attempt to decide in which category [a] case falls." *Bernitsky v. United States*, 620 F.2d 948, 951 (3d Cir. 1980). However, if there did exist a question as to the appropriateness of the test in the Third Circuit, it has now been definitively laid to rest by *Varig Airlines* and *General Public Utilities*. *See Johnson v. United States*, 597 F. Supp. 374, 434 (D. Kan. 1984). ("The Supreme Court rejected the planning level/operational level line of cases adopted by various courts"); *Rulli v. United States*, 581 F. Supp. 1502, (W.D. Pa. 1984) quoting *Griffin v. United States*, 5400 F.2d 1059, 1064 (3d Cir. 1974) ("In the Third Circuit the 'litmus test' is not merely whether judgment was exercised but also whether the nature of the judgment called for policy considerations").

which Congress intended to put beyond judicial review. *Id.* (quoting *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.), *cert. denied*, 389 U.S. 841, 88 S. Ct. 76 (1967).

In this case, plaintiff has challenged four areas of conduct. First, he alleges government employees were negligent in using Cantrell as an informant because of his questionable mental capacity and moral character. Secondly, plaintiff alleges negligence in the supervision of Cantrell. More specifically, plaintiff alleges Curtis Kimmel failed to follow accepted procedures for the use of undercover drug informants. Third, plaintiff alleges Officer Kimmel acted in bad faith in causing criminal charges to be filed. And finally, plaintiff alleges his arrest, coupled with Kimmel's bad faith in bringing criminal charges, constitutes the tort of false arrest. Reduced to their core, plaintiff's allegations challenge the methods used by federal employees in investigating criminal offenses and their reliance on these procedures in causing criminal charges to be filed.

The decision to prosecute a given individual is the quintessential example of discretionary conduct. *See Accadi v. United States*, 435 F.2d 1239 (3d Cir. 1970); *United States v. Arnold*, 403 F. Supp. 172 (E.D. Pa. 1975). That prosecutors possess wide latitude in this regard has never been questioned and the reasons supportive of its existence have often been used to analyze the availability of the discretionary function exception in similar FTCA situations. *See Bernitsky v. United States*, 620 F.2d 948 (3d Cir. 1980); *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1970) (Becker, J.) Furthermore, the protection afforded *prosecutorial decisions* extends even to *prosecutors at the lowest level*. *See United States v. Panza*, 381 F. Supp. 1133 (W.D. Pa. 1974).

With these principles in hand, the United States Court of Appeals for the District of Columbia, when presented with a *similar* factual scenerio, found a plaintiff's action barred by the discretionary function exception. *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983). In so holding the *Gray* court expanded the discretionary function umbrella over not only the decision to

prosecute but also over decisions concerning how best to investigate alleged criminal activities. *It reasoned that "each allegation of improper investigatory conduct is inextricably tied to the decision to prosecute" and to separate the allegations would be to "elevate the form of Gray's complaint over its essence." Id.* at 516.

I fully agree with *Gray* to the extent it holds separating allegations of improper investigatory techniques from the decision to prosecute *would be an exercise in semantic obfuscation*. Deciding *how to investigate, who to investigate, and how to present evidence to the proper authorities are classic examples of immunized prosecutorial conduct*. *See Imbler v. Pachtman*, 424 U.S. 431, 96 S. Ct. 984 (1976). *See also United States v. Faneca*, 332 F.2d 872, 875 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965) ("It is clear that the United States has a *duty* to maintain law and order and to enforce the commands of its courts; just how best to fulfill this duty is wholly within the *discretion* of its officers.") (emphasis in original). Furthermore, such conduct is exclusively within the province of the executive branch making it exactly the type of conduct the discretionary function exception was intended to protect from judicial branch interference. *See Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983).

Plaintiff's allegations that Office Kimmel failed to disclose to the prosecuting authorities the weaknesses in his evidence and that Kimmel initiated criminal proceedings only to "save face" does not require a different result. Complaint ¶19. Despite plaintiff's allegations of intentional conduct, his response to defendant's summary judgment motion contains no supporting evidence. At best, the record shows that government employees may have been negligent in their decision as to what evidence should have been presented.[5] Accordingly, this case is easily distinguishable from cases where a government agent intentionally gave false evidence in order to prosecute an individual, *see Heywood v. United States*, 585 F. Supp. 590 (D. Mass. 1984),

5. The issue of negligence, however, "is not relevant to the discretionary function inquiry" because if discretionary even negligent conduct is protected. *General Public Utilities Corp. v. United States*, 745 F.2d 239, 243 (3d Cir. 1984).

because in those cases the key factor is that the government agent simply possessed no discretion to act as he did. *See id*. *See also Bergman v. United States*, 689 F.2d 789, 792 (8th Cir. 1982) ("discretionary function exception inapplicable to allegations that government employees ignored or failed to comply with regulations or policies designed to guide their actions"); *Staton v. United States*, 685 F. 2d 117 (4th Cir. 1982) (Park ranger's shooting of hunting dog not discretionary function despite federal regulation providing for such activity because ranger's supervisors had eliminated ranger's discretion to shoot by issuing directive that all wild dogs should be captured, not killed.) In the absence of false testimony, it is clear that federal officials have broad discretion in deciding what evidence should be presented to prosecuting authorities.

In reaching the foregoing conclusion I am fully mindful of the standards guiding the grant of summary judgment. *See Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438-39 (3d Cir. 1982)., However, I am also mindful that when a summary judgment motion is filed, the opposing party may not rely on unsupported allegations. As stated in the oft cited case of *Whitaker v. Coleman*, 115 F.2d 305, 306 (5th Cir. 1940) "its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer at trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

In this case the only evidence adduced by plaintiff suggests a negligent investigation and a decision to prosecute which in itself may have been negligent because of the tenuousness of the evidence. While in the typical case it could be argued that this factual evidence is enough to get to the jury such evidence is insufficient in matters like that presented *sub judice*. Otherwise, federal law enforcement personnel would be continually placed between the scylla of acting too quickly thereby evidencing maliciousness and the charybdis of acting too slowly thereby negligently permitting dangerous elements to roam loose in the population. *See, e.g., Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982) (wrongful death action alleging government was negligent in the selection of an individual for participation in

Federal Witness Security Program where, while participating in the program, he murdered plaintiff's husband); *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982) (action by murder victim's family for negligent release of a "known homicidal psychotic" who after release murdered plaintiffs' decedent).[6] Furthermore, as stated in *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967), "if the government could be held liable for prosecuting or failing to prosecute such a case its choices in this area could quite conceivably be affected by such a suit. Thus, a policy decision of the federal government might be influenced by a plaintiff with no governmental responsibility."

In essence, to accept plaintiff's theory of negligent prosecution would be to allow a plaintiff to bypass the well established rule that prosecutorial decisions are protected merely by alleging he was arrested, had the charges dismissed, the arresting officer did A, B, and C when with the benefit of hindsight it would have been better for him to do X, Y, and Z, had the officer done X, Y, and Z plaintiff would not have been arrested, and therefore, malice existed on the part of the officer. Such a theory is entirely too foreign to the well-established principle that prosecutorial decisions are protected even if those decisions evidence an abuse of discretion. *See Estate of Callas v. United States;* 682 F.2d 613 (7th Cir. 1982). Furthermore, as stated in *Lamberton v. United States*, 528 F.2d 441 (2d Cir.), *cert. denied*. 426 U.S. 921 (1976), "a court must look, not to the theory upon which plaintiff elects to proceed, but rather to the substance of the claim which he asserts." *Id*. at 443 (citing *United States v. Faneca*, 332 F. 2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965); *Klein v. United States*, 268 F.2d 63 (2d Cir. 1959); *Coffey v. United States*, 387 F. Supp. 539 (D. Conn. 1975)). In so doing courts must always protect against "judicially admit[ting] at the back door that which has been legislatively turned away at the front door." *Laird v. Nelms*, 406 U.S. 797, 802, 92 S. Ct. 1899, 1902 (1972).

Finally, I recognize that other courts would not necessarily agree with my analysis. For instance, in *Wright v. United States*,

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6. Both of these actions were found barred by the discretionary function exception.

719 F.2d 1032 (9th Cir. 1983), the plaintiff had been indicted for failing to file tax returns and the filing of false tax returns. After the government dismissed the indictment and abandoned its prosecution of Wright, he filed a FTCA action alleging the indictments amounted to malicious prosecution. The Ninth Circuit after noting that "the decision whether or not to prosecute a given individual is a discretionary function" noted that implementation of the decision to prosecute "including the nature of his [the I.R.S. Agent's] testimony before the grand jury, is not immune as a discretionary function." *Id.* at 1035.

Wright and *Gray*, represent the polar extremes, and I concur in the reasoning and the result reached in *Gray*. Furthermore, my analysis of other cases leads me to believe the majority of courts would also follow *Gray*. For example, in *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982), the Second Circuit concluded an *immigration officer's negligent decision to detain an individual was not protected as a discretionary function. In so deciding, the Second Circuit stated the decision was not discretionary because determining whether someone is an American citizen and thus entitled to enter the United States is an "objectively verifiable fact."* *Id.* at 1233. Significantly the *Caban* court then noted that "compared to the decision of the INS agents here, the decision of a narcotics agent as to whether there is probable cause to search, seize, or arrest *raises many more competing considerations*." *Id.* at 1235. Similarly, in *Pooler v. United States*, C.A. 85-35, slip op. (E.D. Pa. May 16, 1985), an action based on the same undercover investigation plaintiff challenged in this case, Chief Judge Luongo reached the same result I do here.

For all of the above reasons, I find plaintiff's complaint must be dismissed.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONNIE BRADLEY	:	CIVIL ACTION
v.	:	
THE UNITED STATES OF AMERICA	:	No. 85-0034

ORDER

AND NOW, this 10th day of July, 1985, for the reasons expressed in the attached memorandum defendant's motion to dismiss is granted.

BY THE COURT:

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J.

APPENDIX "B"

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD POOLER	:	C.A. No. 85-0035
vs.	:	
THE UNITED STATES OF AMERICA	:	

COMPLAINT

A. JURISDICTIONAL ALLEGATIONS:

1. This action is brought pursuant to the Federal Tort Claims Act 28 U.S.C. §1346(b) and 28 U.S.C. §§2674 et seq.

2. An administrative claim on behalf of the plaintiff herein on the claims herein presented was filed with the Veterans Administration in accordance with the requirements of the Federal Tort Claims Act and this has been formally denied on July 24, 1984.

B. FACTUAL BACKGROUND:

3. The plaintiff was an employee of the Veterans Administration Medical Center at Coatesville at all times pertinent hereto and until the time of his arrest.

4. The defendant, acting by and through its agents, servants and employees, John Cantrell, James L.G. Parsons, Peter Marengo and Curtis Kimmel, a policeman with the Veterans Administration Medical Center at Coatesville, conducted an undercover investigation purportedly for the purpose of uncovering and stopping illegal sales of drugs at the Veterans Administration Medical Center at Coatesville. This investigation began in approximately October 1981 and ran through March 18, 1982.

5. As part of the investigation, Kimmel utilized a Veterans Administration employee, John Cantrell, as a confidential informant. Although Cantrell was not employed as a police officer, in his role as confidential informant, he was an agent of the Veterans Administration Police and could be regarded as acting on their behalf and at their direction. Cantrell's role was to purchase illegal drugs at the Veterans Administration from anyone who might sell them to him with monies provided by the Veterans Administration and then turn over the drugs so purchased to Kimmel for analysis. Cantrell was to report his purchases and provide information regarding them to Kimmel. Cantrell was free to select or otherwise target any individual he might choose in an attempt to purchase drugs and was not given the names of any person who was suspected of this activity or was otherwise under investigation. Cantrell was free to utilize whatever means he could to attempt to purchase drugs.

6. Cantrell was known to Kimmel to have had a history of use of illegal drugs, known to have deficiencies in his intelligence and known to have been under psychiatric care in the past.

7. Contrary to professional advice and training provided to Kimmel from formal courses he had taken, law enforcement manuals available to him and direct contact with law enforcement professionals, Kimmel did not verify any of the reports given to him by Cantrell of alleged sales of drugs either by independent observation, electronic recording, observation by a third person, photograph or other means recognized as acceptable in standard police work but instead relied solely upon the uncorroborated reports of Cantrell for the information related to his alleged purchases of illegal drugs and did not maintain close control or surveillance of Cantrell when Cantrell was to purchase drugs.

8. Based solely upon the verbal and uncorroborated reports of Cantrell, Kimmel caused criminal charges to be issued against the plaintiff in which he was charged with selling illegal drugs to Cantrell and on which a warrant for the arrest of the plaintiff was issued and as a result the plaintiff was arrested on or about March 27, 1982.

9. Plaintiff was arrested pursuant to the criminal complaint that Kimmel caused to be issued and was incarcerated until bail was obtained.

10. Prior to causing the criminal complaint on which the plaintiff was arrested to be issued, Kimmel was advised by the Chester County Detectives that Cantrell was not a credible witness and that no prosecution should be based upon his uncorroborated testimony.

11. Kimmel had consulted with a local police official who had been successful in conducting an undercover illegal drug sale investigation and was advised of the proper methods of conducting the type of investigation in which Kimmel was engaged which methods were calculated to develop credible and useful evidence and to avoid the infringement of rights of innocent people. Kimmel did not follow these procedures or advices.

12. Plaintiff did not do those acts with which he was charged in the criminal complaint initiated by Kimmel as aforesaid.

13. The charges against the plaintiff were nolle prossed by the District Attorney of Chester County.

14. Prior to initiating the criminal complaint against the plaintiff, Kimmel consulted with the office of the District Attorney of Chester County. At that time Kimmel did not disclose the prior advice he had received from the Chester County Detectives Office that Cantrell was not to be regarded as a credible witness nor did he disclose the deficiencies in his methods, all of which would have been material in the decision making process of the office of the District Attorney. The Chester County District Attorney's Office would not have approved the complaint against the plaintiff for prosecution if Kimmel had disclosed the prior advice he had received from the Chester County Detectives or had otherwise divulged the known deficiencies of Cantrell as a witness and of the investigation.

15. Plaintiff was caused harm by the negligence of the employees of the United States, Curtis Kimmel, and his superiors and John Cantrell which negligence consisted of:

(a) Breaching the duty to use due care in the proper execution of police functions and in the proper conducting of investigation with the use of an informant.

(b) Ignoring or otherwise not adhering to generally accepted police standards for the development of credible evidence in an undercover investigation which standards were developed to assure accuracy, credibility, and the protection of rights of innocent people.

(c) Ignoring advices received from sources whose opinion and advice Kimmel had sought regarding the inadvisability of pursuing prosecutions and reliance upon the uncorroborated statements of Cantrell and upon the form of his investigation.

16. Detective Kimmel did not have probable cause for the initiation of criminal charges against the plaintiff because a reasonable person or a reasonable law enforcement official would not have regarded Cantrell's uncorroborated statements as credible or worthy as the basis of a prosecution.

17. Kimmel concealed or otherwise failed to disclose his knowledge of the inadequacies of Cantrell as a witness and failed to disclose the prior assessment of Cantrell as not being a credible witness to the Chester County District Attorney and the District Justice that issued the warrant for the arrest of the plaintiff. If the facts known to Kimmel would have been disclosed, the charges against the plaintiff would not have been approved by the Chester County District Attorney.

18. The charges against the plaintiff which led to his arrest were not brought by Kimmel in good faith.

19. The prosecution of the plaintiff as initiated by Kimmel was a malicious use of legal process or a malicious abuse of legal process in that Kimmel brought those charges without good faith, by the concealment of relevant information about the inadequacies of the charges and the basis therefore and not for the purpose of bringing criminal activity to justice but for the purpose of salvaging something from his criminal investigation in order to either save face or make a display for the purposes of

determining other individuals who might engage in sales of drugs at the Veterans Administration Medical Center.

20. Plaintiff was falsely arrested and unjustifiably denied his liberty in violation of his constitutional rights as a result of the conduct of Kimmel.

21. As a result of being arrested plaintiff suffered damages including but not limited to:

(a) An invasion of his privacy.

(b) Deprivation of his liberty.

(c) Deprivation of his constitutional rights.

(d) Loss of image, reputation and standing in the community.

(e) Personal humiliation.

(f) Embarrassment.

(g) Mental and emotional distress.

(h) Monetary expense for his defense in the criminal proceedings.

(i) Loss of his job and employment.

(j) Loss of earnings and potential loss of earning capacity or other impairment of his ability to obtain employment.

WHEREFORE, plaintiff demands judgment in his favor in the amount of two hundred thousand dollars ($200,000.00) or such other amount as the court may deem just.

STEINBERG & GIRSH, P.C.

EDWARD L. McCANDLESS, JR.